SUPREME COURT

AUG 3 1974

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-59

STOCKMEN'S INSURANCE AGENCY, INC.,
Petitioner,

vs.

GUARANTEE RESERVE LIFE INSURANCE COMPANY OF HAMMOND, INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Petitioner prays for the issuance of a Writ of Certiorari to the Supreme Court of North Dakota to review the judgment in the case of Stockmen's Insurance Agency, Inc. v. Guarantee Reserve Life Insurance Company of Hammond, Indiana.

OPINIONS BELOW

The decision and opinion of the North Dakota Supreme Court in Stockmen's Insurance Agency, Inc. v. Guarantee Reserve Life Insurance Company of Hammond, Indiana was made and filed the 25th day of April, 1974, and the order denying the Petition for Rehearing was made and filed the 16th day of May, 1974. (Stockmen's Insurance Agency, Inc. v. Guarantee Reserve Life Insurance Com-

pany of Hammond, Indiana, ... N.W. 2d ..... Printed in Appendix)

JURISDICTION

The statutory authority for issuance of a Writ of Certiorari is 28 U.S.C. 1257 wherein it is provided that the court is authorized to issue said writ in any cause where a final judgment has been passed upon by the highest court of a state and where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Premised upon the United States Constitution being a guaranty of due process and equal application of the law, the questions presented for review are as follows:

Can an appellate judge, admittedly too prejudiced to sit himself, select his substitute who he knows under the court's unwritten code will be assigned the case and will be the only judge to review the record and determine the facts for all the other judges?

Can the substitution of a trial judge to sit as an appellate judge be concealed until the moment of oral argument when it is too late to remove the substitute for prejudice?

Can the substitute stall his decision so long that only a reversal of the trial judge's decision will nullify the outrageous delay and conceal the $50,000.00 tax free windfall which the delay alone gave the racketeer controlled defendant?

Can the failure to select a substitute judge in the manner required by the state constitution be concealed by failing to write an opinion on the point as required by the state constitution?

Can the trial judge selected as appellate substitute examine the cold record and make diametrically opposed findings of fact after the legislature had specifically revoked the appellate court's right to grant a trial de novo?

Where all judges are elected, can a judge from a foreign district be imposed on the local district without violating the elective franchise?

Are the constitutional standards met when the methods of review are concealed, no rules of review exist except a sort of gentlemen's agreement amongst the judges that if a trial judge takes his time to do their appellate duties, the least they can do is go along with him?

The constitutional right to a trial was met and a half million dollar judgment granted, which is a property right. Can the right to a trial and the property right be taken away by the appellate method used here which has so far departed from the accepted and usual course of judicial proceedings as to constitute a denial of due process, equal application of the law, and the elective franchise?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, United States Constitution: No person shall be held to answer for a capital or otherwise infamous crime, unless, on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb; nor shall be compelled in any Criminal Case to be a witness against himself, *nor be deprived of* life, liberty, or *property, without due process of law*; nor shall private property be taken for public use, without just compensation. (Emphasis added)

Amendment XIV, Sec. 1, United States Constitution: All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of* life, liberty or *property without due process of law; nor deprive any person within its jurisdiction of the equal protection of the laws.* (Emphasis added)

STATEMENT OF FACTS

Larry Davis, an ex-convict, organized Stockmen's Insurance Agency, Inc. with public stock subscriptions, which company formed a mutual and later a stock company that issued health insurance policies. Seven general agents engaged about a hundred writing agents, and premium income reached a million dollars a year.

The agreement given the agents was that the general agents would receive renewal commissions of 15% of which 10% (2/3) would go to the writing agents.

Larry Davis arranged with his former associate Ira Lipschutz to have Guarantee Reserve Life Insurance Company of Hammond, Indiana take over the book of business. Before the North Dakota Insurance Commissioner would approve the Assumption Agreement, the Commissioner was assured the agents would continue to receive their renewal commissions.

Guarantee failed to pay the commissions and took all the records and moved them out of the state. The court appointed special master was unable to recover them.

The trial judge awarded judgment to the Agency company reserving jurisdiction to supervise distribution by the Agency company to the salesmen. The Agency company also was one of the general agents operating as the Bismarck Agency. By May of 1971, when judgment was ordered, Guarantee owed renewal commissions of $445,443.98.

The defendant Guarantee appealed and on February 13, 1974, the Supreme Court rendered its decision reversing the trial court. A Petition for Rehearing was filed and denied but the court rewrote its opinion and filed it April 25, 1974, and granted plaintiff fourteen days to file a second Petition for Rehearing on the Amended Opinion. The second Petition for Rehearing was filed May 8, 1974, and denied May 16, 1974.

It was at the time of oral argument that it was first known by plaintiff that District Judge Heen was to sit in place of Supreme Court Judge Strutz.

TIME AND MANNER OF RAISING CONSTITUTIONAL QUESTIONS

The first opportunity to raise the constitutional questions was after the violation and in the first Petition for Rehearing.

We are submitting material that was submitted to the state court as this Court should be assured the question was fully raised and totally ignored.

We quote from the Petition for Rehearing as follows:

CONSTITUTIONAL QUESTIONS

We respectfully allege that the review, as it occurred, was a denial of due process, an unequal application of the law, and disenfranchisement, and in violation of the Fourteenth Amendment to the United States Constitution and Section Twenty-two of the Constitution of North Dakota.

> "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay." (Section 22, North Dakota Constitution)

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Article XIV, Section 1, Constitution of the United States)

> "Rights acquired by a judgment are property rights which cannot be taken without due process of law." (16 Am Jur 2d, Constitutional Law, Section 379)

The review by the Supreme Court of North Dakota contravened the following judicial standards:

1. The appellate court's concealment of methods used in review cannot make improper methods impervious to attack.

2. Justices who decide fact issues, such as the absence of proof, must examine all the evidence.

3. Designating a lower court judge to review the evidence for the appellate court is not proper appellate review.

4. Designating lower court judge A as a temporary member of the appeal court does not elevate his opinion of the evidence to a higher quality than lower court judge B who heard the testimony.

5. An appellate judge, who is admittedly prejudiced, is not allowed to select a lower court judge to take his place.

6. Parties cannot be denied opportunity to challenge a judge for cause.

7. The appellate court cannot bring in a judge not elected in the district to overturn a judge elected in the district.

8. The appellate court cannot decide which elected judges shall be extended respect, credibility, and presumption of regularity.

9. The appellate court cannot give a witness a higher credibility on review because of his popularity, prestige or profession.

10. Substitution of a lower court judge for an appellate judge, permissible in an emergency, constitutes abdication of duty and unauthorized delegation of authority when habitual.

11. Where dilatory conduct of the appellate court would be embarrassing were they to hold one way as against the other, they have become interested in the outcome and are disqualified.

1-4

The mechanics of decision making by the supreme court is shrouded in mystery. There are no rules or guidelines known to the public. Presumably the justices do not flip a coin, but if they did, it would not be known and there is no rule against it. Such secrecy fails to assure the public that they are receiving justice at the hands of the court. Blind faith is not a requirement of citizenship.

There is one public trial and one secret trial and the secret one is the only one that counts because that is the trial by the supreme court.

The rules under which the unimportant trial is had are all published and available to everyone. The rules of the secret trial, if there are any, are known only to a select few.

For example, it may be that one of the secret rules is as follows: "Any time a district judge takes time away from his job to come and do our work, the least we can do is go along with whatever he decides."

> "The constitutional requirement of a hearing requires a fair one before a tribunal with established standards of procedure. Re Buchman, 123 Cal App 2d 546, 267 P 2d 73, 47 ALR 2d 291." (16 Am Jur 2d, Constitutional Law, Section 580, n. 9)

The court should publish and enforce standards and rules to be used in the determination of appellate matters. How one judge thinks, or who argued for what, is of no more concern to the public than how one juror argued or thought. But if four-fifths of the jurors did not hear the testimony their decision should not be upheld.

The acceptable division among justices of researching points of *law* for each other does not permit an appellate judge to determine the *facts* for the others. Before the appellate court can decide, that a district judge who tried the case was wrong, and a district judge who reviewed the record is right, much more than admiration for one or suspicion of the other is required. Just as in fact finding by a jury, each judge must examine all the evidence before the facts found by the trial court can be overturned based upon "preponderance" criteria.

We charge that all the judges did not examine all the evidence before they decided the trial judge decided the facts wrong. That this may not, under the rules, be proved, simply leads us to find whether there are rules compelling the judges to read the record. In the absence of any standard or rule, there is also an absence of any presumption of regularity.

5.

In the present case the trial judge announced his decision for the plaintiff on April 7, 1971. The Defendant-Appellant filed a Notice of Appeal on June 9, 1971, and failed to perfect the record. On September 29, 1971, the appeal was dismissed and sent back to district court, Judge Strutz sitting. Judgment had been entered in the case September 24, 1971. At the latest possible date, December 21, 1971, the Appellant again filed an appeal. Again on failure of Appellant to proceed, Plaintiff filed a motion for dismissal of the appeal. On March 8, 1972, Judge Strutz sitting, Plaintiff's motion to dismiss was denied and the Appellant given some more time to stall in the district court. On April 14, 1972, over a year after the judge's decision, another Notice of Appeal was filed and the case finally reached argument in June, 1972.

Without advising counsel, Judge Strutz had deemed himself disqualified, and according to the Clerk of the Supreme Court he appointed Judge Heen to sit in his stead. The case was assigned to Judge Heen. The first time his involvement was known to Plaintiff was when he appeared on the bench at oral argument.

On February 13, 1974, the decision written by Judge Heen was filed by the court. This was two months less than three years from the time the trial judge announced his decision.

The constitution provides as follows:

> "Section 100. In case a judge of the supreme court shall be in any way interested in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the hearing of said cause." (Constitution of North Dakota, Section 100)

There is no authority for the disqualified judge to make the appointment as was done in this case. Inquiry of the Clerk of the Supreme Court resulted in the advice that there was no minute order or other written document appointing Judge Heen but that Judge Strutz, presumably as chief justice, made the appointment. She advised that occasionally the matter is discussed among the justices. The absence of a record together with the mystery of the procedure coupled with the word from the horse's mouth is persuasive that Judge Heen was not properly appointed.

6.

The procedure of assigning a case and putting the judge on the bench before oral argument, to all practical

purposes, denies a litigant any real relief if the selected judge is prejudiced. Due process requires that a judge either be accepted in advance or an opportunity provided to challenge him for cause. This is not a moot question. Plaintiff's counsel has never won a case before Judge Heen, either trial or review. If Plaintiff knew it was getting Judge Heen, it could have hired another lawyer.

7.

The judge elected in the district found for the plaintiff. A judge elected in another district was imposed upon the plaintiff as an appellate judge. The plaintiff set up its office in Bismarck, not Devils Lake. To avoid the district court judge in Devils Lake, one could either vote him out of office or stay out of his territory. But what happens when he is brought into your territory and overrules your territory's district judge?

A district judge elected in a district outside the forum cannot be imposed on the parties, because to do so abridges the right to vote. In Minnesota the legislature had provided that substitute judges of municipal court could be appointed by the governing council. The Supreme Court of Minnesota said:

> "* * * all judges shall be elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve * * *". (*State* v. *Meisinger,* Minn 1960, 103 N.W. 2d 864)

It is not permissible to foist upon a litigant a judge who was not elected by the people in that district. One man, no vote, will never be an acceptable doctrine.

8.

In the present appeal, Judge Heen's examination of the facts and his report was accepted by the court, apparently without question. This conclusion is inescapable because the findings had several substantial mistakes that would have been caught had the other judges reviewed the evidence. While Judge Heen was not elected by the remaining justices as the constitution requires, there is no reason to expect that he would not be as two of the justices are from his district and are his longtime friends.

On the other hand, the trial judge, who was elected from the district in which the case was tried, has had several encounters with the supreme court and is not admirable in the minds of the justices.

However, the district judge is to meet the approval of the electorate and there is no qualification in law or the constitution requiring his approval by the supreme court. When the people elect a judge, he can be recalled or impeached, but he cannot be treated with less respect, credibility, nor presumption of regularity than one for whom the justices voted. There are no second class district judges.

9.

One of the witnesses in the trial was Forsythe Engebretson, an attorney from a prominent firm and a longtime member of the bar. He retired after trying the case. A serious question to be determined by the trial court was whether this witness had deliberately composed documents and performed tasks in a manner calculated to mislead the plaintiff, its stockholders and agents. The trial court applied the rules of equitable relief because of his conduct and lack of credibility. The supreme court

completely avoided the doctrine in overturning the decision and characterized the witness as simply a counsel who signed a pleading. Such a disparity in the views of the two district judges who examined the facts can only be rationalized by concluding Judge Heen could not bring himself to believe Mr. Engebretson and his firm capable of such conduct. Mr. Engebretson's reputation and prestige was not in the record, and could not be considered by the appellate court.

10.

The supreme court is overworked. Partly for this reason the legislature withdrew the obligation to perform a trial de novo. In an effort to speed up decisions, the supreme court has repeatedly designated a district judge to sit on the court and assigned the decision to him. We call attention of the court to its own records for the proof of this habit. The district courts themselves are grossly overworked. The fact that it took Judge Heen almost two years to get out the opinion in this case supports the contention.

When the constitution was devised it was considered that emergencies might arise when substitutes would be required, and the constitution provided that a district judge could be called in to sit as a justice. Progressively this became more common. Instead of just voting, they became the writers of decisions. While it is only practical that the research on a point of law need not be attended to by each justice, the retrial of a case by a district judge is something else again. One district judge listens to the testimony and determines the facts. Another judge of the same qualifications reverses the decision on appeal.

Procedures which might avoid being unconstitutional in emergency situations are no longer justifiable when

they become commonplace. We need only think of abolition of the writ of habeas corpus in an emergency. The abolition would not be sanctioned when the special circumstances become commonplace.

Ex parte restraining orders, sanity commitment procedures, and innumerable other activities are permitted because the exigencies of the situation do not make unreasonable the emergency action. But under the pretense of emergency a procedure cannot be adopted that is designed to manage the work load. "There are no unmanageable cases, there are only lazy judges." (Judge Miles Lord, Time Magazine, March 4, 1974, page 86)

11.

No justice can be expected to condone the passage of twenty months between argument and decision in this case. We contend that the supreme court was responsible for all the delay after April 7, 1971, plus six months, the reasonable period for appellate review.

> "* * * courts of justice shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation * * *." (16 Am Jur 2d, Constitutional Law, Section 385)
>
> "A stay or suspension law closing the courts for such a period as 2 years violates the guaranty of a remedy for all injuries." (16 Am Jur 2d, Constitutional Law, Section 385)

The justices could decide for or against Plaintiff. If they decided against the Plaintiff the unreasonable delay would appear harmless and go unnoticed.

But what if they upheld the trial court? Let's examine the facts.

The award of $445,000 was the largest judgment in a non-government case ever awarded in the district, if not in the entire state. However, the press failed to find the story. The supreme court had previously admonished counsel for letting the public know what the courts were doing, or, as they phrased it, "trying cases in the newspaper". Admittedly getting the largest award ever would be a feather in the hat of any not-allowed-to-advertise attorney. However, the story was not leaked or caused to be leaked. Almost no one knows of the case, but if the supreme court had upheld the award, everyone would know of the case.

Since Plaintiff's judgment required the defendant to account and pay each month on renewals received, the award by now should exceed $600,000. The law only allows four percent interest. If the Defendant would have had to pay the award two years ago, they would have expended a half million dollars and would have had to borrow that additional amount and could do no better than prime rate. Between the statutory rate and prime is at least five percent which amounts to $25,000 a year. Each year of the supreme court's delay gave Guarantee a $25,000 windfall. Two years, $50,000, *tax free.*

A large number of people know that Guarantee Reserve of Hammond, Indiana is a Mafia connected company. Such has been noted by Jack Anderson and "The Green Felt Jungle". If the supreme court upheld the trial court it would be known that they took two years to decide a case and the delay netted fifty grand for the racketeers.

When the court has conducted itself in an improper manner and the embarrassment could be concealed or pub-

licized, depending on how they decide a case, then the justices have become interested.

> "A cause shall not be heard before a prejudiced court." (16 Am Jur 2d, Constitutional Law, Section 382)

What better right is there to a re-hearing than that the justices have become prejudiced?

This concludes the material that was presented to the State Supreme Court.

Due process requires more than exercise in futility. A fair and impartial trial did take place in the trial court.

> "The right of appeal or review is not essential to due process, provided due process has been accorded in the tribunal of first instance." 16 Am Jur 2d, Const. Law, 584. Citing *District of Col.* v. *Clawans,* 300 U.S. 617, 81 L.Ed. 843, 57 S.Ct. 660.

Is the due process requirement satisfied when the trial was fair? Then can the award of the fair trial be overturned by an appellate proceeding not subject to review or control?

> "But such rules governing appeals must operate uniformly." 16 Am Jur 2d, Const. Law, 584.

Flipping a coin would meet the uniformity rule but hardly the due process requirement.

IMPORTANCE OF THE QUESTION PRESENTED

It is necessary that the Court stand ready to strike a blow against those who abuse executive or legislative power. Is it not an even greater duty to protect the people from "unusual doings in high places" in the judicial branches?

This highest state tribunal has refused to follow the state constitution and has disregarded the limitations on its powers imposed by the legislature. There is no place to go for relief except to the Supreme Court of the United States.

Recall or impeachment may answer the problem of removing judges. But here the problem is the court itself. The court fails to announce rules for its own conduct. It is the court itself that fails to record the keeping of the rules.

We do not suggest that the Supreme Court of the United States compose rules for the state courts, but that it establish guidelines through finding the conduct in the present case failed to meet the required standards of due process and equal application of the law.

CONCLUSION

In 1960 the North Dakota Supreme Court at the last moment ordered stricken from the ballot those presidential electors pledged to Wayne Morris. Their order stated it would be followed by a published decision. There never was a decision.

The incident is mentioned because it is a precedent. No matter how heavyhanded or outrageous their conduct, they will never be called to task.

Thirty years ago certiorari to this state court was possible, and North Dakota decisions were quoted like California, New York and Ohio. Now they are quoted with the regularity of those from Guam.

Unless the United States Supreme Court intervenes, we cannot have justice in North Dakota against insurance companies, banks and other large corporations. We might just as well limit our law library to a copy of the Polks Directory and Dun and Bradstreet, for in those books will be found the material upon which the decisions will be based.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

No. 8812

Stockmen's Insurance Agency,
Inc., a corporation,
Plaintiff and Cross-Appellant

v.

Guarantee Reserve Life Insurance Company
of Hammond, Indiana, a corporation,
Defendant and Appellant

1. The right to an accounting is a preliminary question which must be answered in the affirmative before the actual accounting is ordered, and the burden of proving such preliminary issue is on the party asking the relief.

2. An insurance agent's right to commission on renewal premiums is such as he acquires under the terms of his contract with his employer.

3. A general agent, even if his powers and duties are not reduced to writing, is competent to testify as to his authority.

4. An admission made in pleadings, signed only by counsel, in other proceedings, is not conclusive and may be explained or contradicted.

5. A finding by a trial court, under Rule 52(a), N.D. R.Civ.P., presumptively is correct and will not be set aside

unless "clearly erroneous." Conclusions of law, however, are fully reviewable on appeal. Whether a particular finding is a finding of fact or is a conclusion of law will be determined by the reviewing court, and a designation by the trial court is not conclusive. For the reasons stated in the opinion certain findings of the trial court are found to be clearly erroneous.

6. Questions unnecessary to the decision of a case need not be, and will not be, considered.

(Syllabus by the Court)

Appeal from the judgment of the District Court of Burleigh County, the Honorable M. C. Fredricks, Judge.

AFFIRMED IN PART AND REVERSED IN PART.

Opinion of the court by Heen, District Judge.

Harry J. Pearce, of Pearce, Engebretson, Anderson, Schmidt, Pearce & Thames, Bismarck, North Dakota, attorney for defendant and appellant.

William R. Mills, Bismarck, North Dakota, attorney for plaintiff and cross-appellant.

Stockmen's Insurance Agency, Inc.

v.

Guarantee Reserve Life Insurance Company of Hammond, Indiana

HEEN, District Judge

The District Court sitting without a jury dismissed the plaintiff's cause of action based upon an alleged contract for a management fee, but awarded the plaintiff a money judgment and ordered an accounting on a second cause of action for commission on renewal insurance pre-

miums. The defendant has appealed, and the plaintiff has cross-appealed from that part of the judgment adverse to such party.

Incorporated in North Dakota in May 1959, Stockmen's Insurance Agency, Inc., (hereafter referred to as "Stockmen's"), intended as its stated objective to sell a million dollars of its own stock which would serve as a financial footing for a subsidiary stock insurance company dealing in life, health and accident insurance. Formation and licensing of the subsidiary required an initial outlay of some $275,000, and Stockmen's sales of its own stock was disappointing for by mid-April 1960 only $67,170 had been realized from this promotion.

Stockmen's, because of its seriously limited finances, temporarily abandoned its original plan for a stock insurance company. Following this reappraisal, and in need of a source of income, Stockmen's organized a subsidiary corporation, Stockmen's Health Mutual Insurance Company (hereafter called "Mutual"), organization of which required substantially less financing than the original stock venture and was more in keeping with Stockmen's available resources. The officers, directors and management personnel of Stockmen's and Mutual were identical. Stockmen's prospectus openly acknowledged that although a mutual would not return dividend income, nevertheless, Mutual would serve as an income-producing vehicle for Stockmen's, the parent corporation. This was to be accomplished, according to Stockmen's 1959 Prospectus, by a contemplated agreement under which Stockmen's would in effect be Mutual's general agent and agency director and would manage its affairs and finances. Remuneration for these services, however was not disclosed in this prospectus.

Such an executed management and general agency contract was not produced during the trial of this case. Whether such an agreement existed and, if it did, its terms, conditions and provisions, proved to be a critical issue in this case.

Stockmen's minutes of the May 10, 1960, special meeting disclose only that its stockholders approved formation of a subsidiary mutual insurance company as an expedient source of income for Stockmen's and as outlined in the notice of the special meeting, including the proposed plan's further refinement calling "for an exclusive agency contract between the mutual company and Stockmen's . . . which company will also manage the affairs and finances of the mutual company." Following stockholder approval of this proposal, it was unanimously resolved

> That the officers of Stockmen's . . . prepare the necessary amendment to the registration of the company with the States Securities Commission to effectuate the plan set forth in the notice of meeting and to proceed at once to make the necessary loan to the Mutual company to get the Mutual company in operation.

Apparently Stockmen's directors had anticipated the favorable action by its stockholders on May 10, 1960, of the plan to form the mutual insurance company because Mutual then already was organized and had received its charter on May 3, 1960. Two days later, Mutual's incorporators and directors held their first meeting and Mutual's actual operation commenced on June 7, 1960.

Mutual's sales force was recruited by Robert Bryson who held the title of agency director. The evidence is far from clear as to whether Bryson was hired by Stockmen's or by Mutual, but in any event Bryson organized

Mutual's sales structure in North Dakota. Seven general agencies (Bryson's testimony denotes the seven as such) were set up in various cities. Stockmen's Prospectus of July 1, 1962, noted that the seven agencies "possess those powers entrusted to a general agency . . ." Over a hundred writing agents were connected with the seven agencies. In enlisting sales personnel, it was understood by the agents, Mutual, and by Stockmen's—there were no written agency contracts—that general agents were to receive 5% and the writing agent 10% of all renewal premiums paid on Mutual policies written by or through such agent. An additional unwritten inducement provided that if an agent terminated sales representation for Mutual, thereafter he would continue to receive similar commission for the number of years the agent had sold Mutual, which if five years or more, would vest the agent's right to renewal commission for his lifetime. As stated, no written agency contracts, general or selling, embodying these compensation arrangements were executed. With this understanding, the sales force began solicitation and sale of Mutual policies.

Stockmen's somber financial picture brightened somewhat and persisting in its original plan, Stockmen's in December 1961 organized Stockmen's Reserve Life Insurance Company (referred to hereafter as "Reserve"), and caused it to be licensed for North Dakota operation. Reserve, then, was Stockmen's long desired subsidiary stock insurance company, and Reserve's board of directors interlocked with those of Mutual and Stockmen's.

In June 1962, Reserve commenced phasing out Mutual by assumption of the latter's insurance contracts. From the time of its organization and licensing, and during the period of acquisition mentioned above, Reserve sold its own policies using the sales structure set up for Mutual,

sales personnel continuing to operate without written agency contracts but under the same understanding of commission schedules as existed with Mutual.

Almost from its beginning, Reserve was plagued by financial difficulties. By late summer 1962, Reserve's unpaid claims under policy coverage, the claims being in an amount of some $180,000, nearly equaled its legal reserve of $200,000 on deposit with the State Insurance Commissioner. Because of this fiscal imbalance, Reserve anticipated imminent issuance by the Commissioner of an order enjoining it from further policy sales until all outstanding claims were paid and its legal reserve, if resort to this fund was required for payment of claims, again was built up to the required $200,000.

At this juncture, Reserve urgently needing to extricate itself from its financial dilemma, did so by selling its book of business to Guarantee Reserve Life Insurance Company of Hammond, Indiana (denoted hereafter as "Guarantee"). Reserve's policy liability, which included policies originally issued by Mutual, was transferred to Guarantee by a written *Contract of Reinsurance and Assumption*, dated July 27, 1963, executed by Reserve and Guarantee as principals, and ratified by Mutual and Stockmen's, the latter being the plaintiff in this action.

Under the terms of the assumption contract, Reserve was relieved of, and Guarantee assumed, all liability arising under policies issued by Reserve or by it accepted in acquiring Mutual's policies.

In demanding an accounting and a money judgment from the defendant, the complaint of the plaintiff, Stockmen's, in effect pleads two causes of action, both of which are concerned with liability assumed by defendant Guarantee under the terms of the *Contract of Reinsurance*

and Assumption. It is the plaintiff's claim that under the alleged Stockmen's-Mutual *Agency Contract,* Mutual was obligated to pay the plaintiff a 25% percent commission of its policy renewal income, such commission consisting of a 10% management fee, plus the 15% commission of the general and selling agent. The plaintiff further maintains that Reserve in converting Mutual's policies accepted these obligations and ensuing liabilities, which in turn were assumed by Guarantee by the terms of its *Contract of Reinsurance and Assumption* with Reserve.

Accordingly, the plaintiff asks first, as a separate cause of action, that it be awarded, and that defendant Guarantee pay, a management fee of 10% of all renewal premium income from policies originally written by the plaintiff's subsidiaries, Mutual and Reserve, and acquired by the defendant. Recovery under this cause of action was denied by the trial court.

For a second cause of action, the plaintiff alleges that defendant Guarantee is chargeable with and should pay plaintiff an additional 15% of all such renewal income, 10% of which would be allocated by the plaintiff to the writing agent with the plaintiff retaining the remaining 5% for acting as general agent at the time of the writing of the policy. Under this cause of action, the District Court ordered an accounting, and awarded the plaintiff a money judgment against the defendant. In doing so, the trial court found and concluded that Mutual and Reserve in the first instance were obligated to pay plaintiff Stockmen's both a general and selling agents' commission under the management and agency agreement allegedly existing between these subsidiary corporations and the plaintiff, and, that defendant Guarantee agreed to assume such obligations in the contract by which the

defendant acquired and reinsured insurance policies originally issued by Mutual and Reserve.

In appealing, the defendant has detailed numerous specifications of error, the first of which to be considered is that the trial court erred in concluding that the defendant should pay the plaintiff a 15% general and writing agent's commission on all renewal income received from insurance policies acquired by the defendant from Reserve and in awarding a money judgment and decreeing an accounting. The defendant's challenge to the District Court's findings, conclusions and judgment is based upon the ground that the defendant was not so contractually obligated, either because such a contract did not exist or because the defendant did not assume the liabilities of such an agreement.

The plaintiff has cross-appealed specifying that the District Court erred in determining that the plaintiff is not entitled to a management fee on renewal income received by the defendant from those policies acquired from Reserve.

We reverse the District Court's finding and conclusion that the plaintiff is entitled to the 15% general and selling agents' commissions on all renewal income received by the defendant from insurance policies acquired from Reserve, and to an accounting; and affirm the trial court's dismissal of the plaintiff's cause of action based upon its claim to a management fee.

The right to an accounting in all cases is a preliminary question which must be answered in the affirmative before the actual accounting is ordered. A party is not entitled to an accounting simply because he demands that remedy. Rather, the party claiming the relief, the plaintiff in this instance, has the burden of proving its right to the account-

ing. If not so proved, there is no right to an accounting and the cause is to be dismissed. Stuber v. Taylor, 200 N.W.2d 276 (N.D. 1972); Munce v. Munce, 77 S.D. 594, 96 N.W.2d 661 (1959); 1 C.J.S., Accounting, Section 39, pages 677-678, and Section 40, pages 680-681; 1 Am.Jur. 2d, Accounts & Accounting, Section 62, page 436.

An insurance agent's right to commission on renewal premiums depends upon the agent's contract of employment, and the agent has no right to such a commission unless the employment contract expressly and specifically provides therefor. Geiss v. Northern Insurance Agency, 153 N.W.2d 688 (N.D. 1967).

In this case, there is no written agency contract purporting to appoint or constitute the plaintiff as agent for defendant Guarantee; nor did these parties execute any writing under which the plaintiff was to furnish management service to the defendant.

The *Contract of Reinsurance and Assumption* which is in question in this case and under which defendant Guarantee acquired Reserve's book of business, however, did touch upon the matter of agents' commissions, the agreement in part providing:

> 7. No liability, debt or obligation of (Reserve) is assumed by Guarantee . . . under this contract other than the liability to the policyholders, certificate holders and beneficiaries of the insurance policies hereinabove specifically assumed, *except as to commissions to agents, as provided for in connection with existing written contracts.* (Emphasis supplied).

The plaintiff, despite the absence of a written agency agreement directly with the defendant, contends that under the emphasized language of paragraph 7 of the assumption agreement, as it appears above, defendant Guarantee

expressly and specifically agreed to pay the plaintiff a 15% agents' commission, thus satisfying the rule of *Geiss*. In arriving at this result, the plaintiff's reasoning and assumptions are as follows: that the Stockmen's-Mutual *Agency Contract* of May 10, 1960, was in writing and was an existing valid contract between Stockmen's and Mutual; that such agreement, under which the plaintiff claims to be entitled to agents' commissions and a management fee from Mutual, was accepted by Reserve; and that thereafter, the obligations of that agreement were assumed by the defendant by its execution of the July 27, 1963, written *Contract of Reinsurance and Assumption* through which it acquired Reserve's insurance policies, specifically by the above emphasized portion of paragraph 7 of that agreement.

The parties differ markedly in their interpretation of paragraph 7. This section, as the plaintiff sees it, means that defendant Guarantee assumed, and should pay, agents' commissions, whether fixed by oral or written agency agreement, as such were incurred by Reserve at the time of its issuance of those insurance policies later transferred to the defendant and which presently exist.

On the other hand, the defendant's interpretation of the section is that defendant Guarantee assumed, along with Reserve's insurance obligations, liability for only such agents' commissions as are provided for in existing written agency contracts. The defendant takes the position that since the plaintiff is unable to produce such a written agency contract whereby it served as Reserve's general agent at the time the defendant acquired Reserve's business, there is no liability owing by the defendant to the plaintiff for agents' commissions.

At this point, it must be borne in mind that this is not a proceeding instituted by the individual writing

agents or the seven agents possessing the powers of general agents, but rather is an action by plaintiff Stockmen's, which claims that as Reserve's general agent it is entitled to the whole of agents' commissions from which it will remit to the other agents according to their status. Accordingly, and regardless of the interpretation accorded paragraph 7, whether that of the plaintiff or that of the defendant, the plaintiff, to recover agents' commissions and to justify its demand for an accounting, must do so in its own right as established by its own agency contract with Mutual, and must further prove that such agency contract was assumed by Reserve and then in turn by the defendant.

Contending that it was Mutual's general agent and that such appointment was in writing, the plaintiff at trial unable to produce such an executed written agency contract—the lack of which the plaintiff charges is the result of the defendant's machinations—resorted to secondary evidence to prove existence of the agency agreement. In this connection, the plaintiff places great reliance upon an unsigned copy of the May 10, 1960 *Agency Contract,* the named principals to which are the plaintiff and Mutual. This contract, which the plaintiff contends was assumed by Reserve and then by the defendant, among other things, provides:

> (T)hat the (plaintiff) will be responsible for all fiscal affairs of the mutual, will handle all investments and furnish such management as may be necessary in the proper operation of the mutual.
>
> (T)hat the (plaintiff) shall, at the end of each month's operation, receive, for the services rendered, ten percent (10%) of the gross premium and each renewal thereof, which said ten percent (10%) shall be exclu-

sive of any salaries, *agent's commissions* and items generally considered as overhead. (Emphasis supplied.)

No officers of either plaintiff Stockmen's or Mutual during trial testified that they executed the *Agency Contract* for and on behalf of the principals nor was any other direct proof of the execution of the agreement offered.

The plaintiff, however, points to its 1961 Prospectus, issued to promote sales of its own stock, which set out that Stockmen's stockholders at a May 10, 1960, special meeting approved a twenty year agency and management contract with Mutual. This agreement, according to the prospectus, in part provided that Stockmen's would "handle all agency matters and provide all management necessary for the efficient operation of" Mutual and would be responsible for all Mutual's "fiscal affairs" and "investment matters." For these services, Stockmen's was to be paid, in the language of the prospectus, "10% of the gross premium and renewed income, which 10% shall be exclusive of and in addition to overhead items including salaries, agent's commissions and other operating expenses." This proof of the existence of such a management and agency contract is corroborated, so the plaintiff argues, by similar statements appearing in at least two of Stockmen's subsequently issued prospectuses.

As is readily discernible, the language of the 1961 Prospectus, illustrative of that employed in later prospectuses, is but a paraphrase of that of the *Agency Contract*, the pertinent sections of which are set forth above.

Examination and consideration of the two sections of the *Agency Contract* set forth above do not lend support to the plaintiff's claim of agency by written appointment.

The reference to "agent's commissions" in these paragraphs has the function only of specifying the extent of the management fee for prescribed services to be furnished by the plaintiff to Mutual, its subsidiary. Under any interpretation, the wording of these paragraphs alone would not serve to confer a general agency upon the plaintiff.

The plaintiff argues that under the evidence of this case, all of Mutual's and Reserve's agents had the same commission arrangement, which included commissions on renewals, and since this is established the plaintiff should prevail. This argument, however, assumes that the plaintiff was Mutual's general agent. There is no proof in this case of the manner in which the plaintiff acted as agent. In this respect, a general agent, even if his powers and duties were not reduced to writing, is competent to testify as to his authority. Reeves & Co. v. Bruening, 13 N.D. 157, 100 N.W. 241 (1904). Further, the testimony of any person who has requisite knowledge is admissible to prove the fact of agency. Remmick v. Mills, 165 N.W.2d 61 (N.D. 1968). Despite the admissibility of this class of evidence, none was produced.

Next to be considered is the plaintiff's contention that the defendant's pleading in other legal proceedings admitted the truth of the plaintiff's claims in this action. Such conclusive effect cannot be accorded this class of evidence where, as here, the evidence shows only that such pleadings were signed by counsel and where as in this case those pleadings have been explained and contradicted. Power v. Williams, 53 N.D. 54, 205 N.W. 9 (1925); Union Nat. Bank of Minot v. Western Bldg. Co., 44 N.D. 336, 175 N.W. 628 (1919). See, Gallegher v. Haffner, 77 N.D. 570, 44 N.W. 2d 491 (1950).

The evidence opposing the plaintiff's contention that it was the general agent for its subsidiaries, Mutual and

Reserve, is formidable and considerably more persuasive. Robert Bryson, the agency director who organized Mutual's sales force, as earlier noted, referred repeatedly in his testimony to the various general agents serving Mutual without including the plaintiff in that listing. The State Insurance Commissioner's examination of Mutual's business operation, the report of which is dated March 21, 1961, and which was received in evidence without objection noted that:

> The Company (Mutual) operates on a general agency plan, the General Agents supervise the business for their designated area through special (direct writing) agents. General Agents are responsible for their own accounts and acts and for those of Special Agents under their respective supervision.

Even more significantly, the Insurance Commissioner's report continues to say:

> There are no agents (sic) contracts in writing in force and outstanding at this date. All agents are compensated on a commission basis and all appointments of agents are subject to Home Office approval. Currently there are six General Agents licensed and approximately one hundred seventy Special Agents, about ninety of which are active.

Whatever weight may be accorded the plaintiff's declarations in its several prospectuses that it had executed a management and agency contract with Mutual is lessened by its later contradictory prospectus statement that fees allegedly accruing under that contract were not to be considered Mutual's valid debts.

Further, the Stockmen's Prospectus (January 2, 1962) in projecting the futures of Mutual and Reserve set forth that if Reserve were to assume the mutual company con-

tracts, the "agency and management contract . . . between Stockmen's . . . and . . . Mutual will be terminated." And it is an acknowledged fact of this case, that Reserve in fact did assume the mutual company's contracts.

A finding by a trial court, under Rule 52(a), N.D.R. Civ.P., presumptively is correct and will not be set aside unless "clearly erroneous." Conclusions of law, however, are fully reviewable on appeal. Whether a particular finding is a finding of fact or is a conclusion of law will be determined by the reviewing court, and a designation by the trial court is not conclusive. Ferguson v. Ferguson, 202 N.W.2d 760 (N.D. 1972); Northwestern Bell Telephone Company v. The Board of Commissioners of the City of Fargo, 211 N.W.2d 399 (N.D. 1973)

North Dakota adopted Rule 52 (a) verbatim from the Federal Rules of Civil Procedure. Deeming the interpretation of that rule by the Federal courts as highly persuasive, this Court in In re Estate of Elmer, 210 N.W.2d 815 (N.D. 1973) stated that it is not the function of the appellate court "to decide factual issues de novo" and approved the Federal definitive test that,

> A finding is "clearly erroneous" only when, although there is some evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. United States v. United States Gypsum Co., 333 U.S. 346, 68 S.Ct. 525, 92 L.Ed. 746 (1948). The mere fact that the appellate court might have viewed the facts differently, if we had been the initial trier of the case, does not entitle us to reverse the lower court.

Concluding that there was a failure of proof, this Court in Hofer v. W. M. Scott Livestock Company, 201

N.W.2d 410 (N.D. 1972) set aside the findings of the trial court.

Our examination of the evidence of this case demonstrates that there is little, if any, proof that Mutual ever appointed the plaintiff as its general agent, or that the plaintiff ever performed duties which properly could be ascribed to such a general agency, or that the plaintiff ever received such a general agent's commission as here demanded from either Mutual or Reserve. We are firmly convinced that the findings of the trial court that defendant Guarantee was to pay Stockmen's a 15% commission on all renewal income from all Mutual or Reserve policies assumed by Guarantee is without adequate evidentiary support, that the trial court was mistaken and erred in making such a finding and that this finding by the trial court was clearly erroneous and must be reversed.

There is substantial evidence in this case supporting the trial court's finding that the plaintiff was not entitled to a 10% management fee from Guarantee. Since this finding was not clearly erroneous, it is affirmed.

As earlier set forth, the plaintiff must prove, as a preliminary issue, its right to an accounting before the actual accounting will be undertaken. In this case, the plaintiff did not prevail in either of its causes of action, and it follows that the plaintiff is not entitled to an accounting having failed to prove its right to this remedy.

The remaining questions raised by the specifications of error are not necessary to the decision in this case and need not be, and are not, considered. Inches v. Butcher, 104 N.W.2d 556 (N.D. 1960); Heald v. Strong, 24 N.D. 120, 138 N.W. 1114 (1912).

In the course of this decision, the varying interpretations by the parties, as previously summarized, of para-

graph 7 of the *Contract of Reinsurance and Assumption* were considered. In doing so, the usual rules governing construction of contracts were employed. Purely by way of comment, for what already has been said is decisive of this action, we are satisfied that the words of paragraph 7, "existing written contracts," have reference to written sales agency contracts and not insurance policies, and thereby Guarantee assumed only the obligation to pay individual sales commissions as required by written agency contracts. By the language of the paragraph in question, Guarantee first assumed Reserve's insurance policy liability, all of which necessarily was in writing. The remaining part of the paragraph was exclusionary, limiting Guarantee's accepted and assumed liability, not to written insurance policies which had already been assumed, but to sales commissions provided for in existing written agency contracts. Since Reserve had no written contracts with its agents, Guarantee did not incur Reserve's obligation to pay its sales agents' renewal commissions.

The judgment of the District Court awarding the plaintiff a money judgment against the defendant, and decreeing an accounting is reversed. We do, however, affirm the order and judgment of the District Court in dismissing the plaintiff's cause of action that it was entitled to, and the defendant should pay, a management fee.

/s/ Douglas B. Heen
/s/ (Illegible)
/s/ (Illegible)
/s/ (Illegible)
/s/ (Illegible)

The Honorable Alvin C. Strutz, Chief Justice at the time this case was heard, deemed himself disqualified and the Honorable Douglas B. Heen, District Judge of the Second Judicial District, sat in his stead.

APPENDIX B

(Heading Omitted)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

This action having come on for trial on the 23rd day of February, 1971, and the parties having submitted their evidence and the matters having been briefed and argued and the court being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. The court has jurisdiction of the parties and the subject matter of the action.

2. The Plaintiff, Stockmen's Insurance Agency, Inc., is a North Dakota corporation and was engaged in the general insurance agency business.

3. The Defendant, Guarantee Reserve Life Insurance Company of Hammond, Indiana, is a corporation authorized to and does transact business within the State of North Dakota.

4. That the Plaintiff engaged a sales force and sold policies of insurance in North Dakota for Stockmen's Health Mutual Insurance Company and for Stockmen's Reserve Life Insurance Company, Inc.

5. That the Plaintiff was to receive commissions for selling the policies of insurance which include the amount of fifteen percent of each renewal premium, to be computed and paid to Plaintiff monthly as the premiums were received from the customers.

6. That on the 27th day of July, 1963, the policies involved were transferred to and assumed by the Defendant and the Defendant agreed to continue to pay the renewals and agreed to continue to employ the Plaintiff's agents so that the agents could receive renewal commissions for such additional period as they became entitled to.

7. That the Defendant has received premiums from the policies reinsured and assumed and continues to receive them at this time and will continue to receive them in the future.

From the foregoing, the court makes the following:

CONCLUSIONS OF LAW

1. The Plaintiff is entitled to receive from Defendant fifteen percent of all renewal premiums received by Defendant from the policies assumed from Stockmen's Reserve Life Insurance Company, Inc.

2. The Defendant is entitled to offset against the above, the amounts of commissions it has paid the general agents and salesmen who worked for the Plaintiff in writing the policies.

3. The Defendant is entitled to offset against the above, the amounts of agents balances which it purchased in the Assumption Agreement.

4. The Plaintiff is entitled to receive interest, computed at four percent per annum, on the monthly balances due, said interest to commence at the end of the month which follows the month in which the Defendant received the premium.

5. The Defendant shall be entitled to a release and discharge of the indirect obligation to sub-agents so as

to prevent double payment, and the court will continue jurisdiction of the proceeds to accomplish this protection.

Upon the foregoing findings of fact and conclusions of law, it is;

ORDERED, ADJUDGED AND DECREED

1. The Defendant shall produce and file with the court the following material, under oath, and within thirty days, or such further time as the court may grant for good cause shown,

A. The monthly premiums received by Defendant on the policies obtained from Stockmen's Reserve Life Insurance Company, Inc., beginning July 27, 1963.

B. The monthly premium income on policies produced by each of the general agencies of Plaintiff.

C. The monthly premium income on policies produced by each writing agent.

D. The dates of termination of each general and each writing agent of Plaintiff that continued with Defendant.

E. Each payment made each general or writing agent, the date, amount, and purpose of same.

F. Each claim of Defendant against each general and each writing agent.

2. The Plaintiff shall have Judgment against the Defendant for fifteen percent of the renewal premiums, less the amounts previously paid by Defendant to the agents as commissions and less the amounts of agents balances, and Plaintiff shall have Judgment for interest on the unpaid balance at four percent per annum and its costs and disbursements herein.

3. The Defendant shall monthly account for and pay to Plaintiff the amount of fifteen percent of the renewal premiums received from the policies purchased and assumed from Stockmen's Reserve Life Insurance Company, Inc.

Dated this 12th day of May, 1971.

/s/ M. C. Fredericks
M. C. Fredericks, Judge

(Heading Omitted)

PRODUCTION AND AFFIDAVIT

1.

A. Attached hereto is Report #2. The month, year, and the premium received by Guarantee on the Stockmen business each month is set out therein. This listing is a compliance with Order A. The total premiums received through April, 1971, are $3,278,123.32.

B. & C. Attached hereto is Report #1. This shows monthly premium income on policies produced by each general and writing agent. The number used for each agent and each general agency is attached as Report #3. This listing is a compliance with Order B and C.

D. Attached hereto is Report #3. Each agent of Stockmen's is listed by name and number. Those who went with Guarantee have the date of their termination with Guarantee after their name. Those without a date did not go with Guarantee. This is a compliance with Order D.

E & F. Attached hereto is Report #4. Each payment made by Guarantee to each general and writing agent is listed thereon with the date, amount and purpose of same and adjusted for amounts claimed due by agents

to Guarantee. This is a compliance with Order E and F.

2.

Fifteen percent of the renewal premiums is the sum of $491,718.53. The amounts previously paid by Defendant to the agents and the amounts of agents balances total $122,116.63. The interest on the unpaid balance at four percent is the sum of $75,842.08. Fifteen percent of the renewal commissions less payments and agents balance with interest of four percent is the sum of $445,443.98 as of May 1, 1971.

Dated this 17th day of September, 1971.

Guarantee Reserve Life Insurance
Company of Hammond, Indiana
By /s/ Harry J. Pearce
Attorney for Defendant

State of North Dakota

ss

County of Burleigh

AFFIDAVIT

Harry J. Pearce, being first duly sworn, on oath deposes and says:

1. That he is one of the attorneys for the defendant and makes this affidavit in said defendant's behalf.

2. That he executed the above document and produced the exhibits and certifies that they are true and correct to the best of his knowledge, information and belief.

Dated this 17th day of September, 1971.

/s/ Harry J. Pearce
Harry J. Pearce

Subscribed and sworn to before me this 21st day of September, 1971.

/s/ June Mehrer
June Mehrer, Notary Public
Burleigh County, North Dakota

My Commission Expires 2/2/72.
(Seal)

(Heading Omitted)

JUDGMENT

This action having come on for trial on the 23rd day of February, 1971, and the parties having submitted their evidence and the matters having been briefed and argued and the court being advised in the premises, and the defendant, pursuant to the order of the court, having produced under oath and filed with the Clerk the accounting required, and the court having made and filed its Findings of Fact, Conclusions of Law and Order for Judgment,

NOW THEREFORE, it is,

ADJUDGED, DETERMINED AND DECREED

1. The plaintiff has judgment against the defendant in the sum of Four Hundred and Forty Five Thousand, Four Hundred and Forty Three and 98/100 Dollars ($445,443.98).

2. The defendant shall monthly account for and pay to Plaintiff the amount of fifteen percent of the renewal premiums received from the policies purchased and assumed from Stockmen's Reserve Life Insurance Company, Inc., beginning with the month of May, 1971.

3. The Plaintiff has judgment for costs and disbursements in the sum of $57.00.

WITNESS the Honorable M. C. Fredricks, and my hand and the seal of said Court

Dated this 24th day of September, 1971.

By the Court:

/s/ Thora Dennis

Clerk of District Court

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FILED

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-[illegible]

STOCKMEN'S INSURANCE AGENCY, INC.,
Petitioner,

vs.

GUARANTEE RESERVE LIFE INSURANCE COMPANY OF HAMMOND, INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-59

STOCKMEN'S INSURANCE AGENCY, INC.,
Petitioner,

vs.

GUARANTEE RESERVE LIFE INSURANCE COMPANY OF HAMMOND, INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner's recitation of the opinion below is incomplete. The first opinion of the North Dakota Supreme Court was filed February 13, 1974. Petitioner, after receiving an extension of time from the Court, filed a petition for rehearing on March 8, 1974. By minute order entered on April 25, 1974, the North Dakota Supreme Court amended its opinion, denied the pending petition for rehearing and granted petitioner fourteen days in which to file a petition for rehearing as to the amended opinion. Petitioner filed a second petition for rehearing on May 8, 1974. On May 16, 1974, the Court denied the second petition for rehearing. The amended opinion is officially reported at 217 N.W.2d 455 (N.D. 1974) and is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent denies that petitioner seasonably raised a federal question in the Court below and therefore respectfully submits that petitioner cannot properly invoke the jurisdiction of this Court. The petition for Writ of Certiorari wholly fails to establish that ". . . any title, right, privilege or immunity [was] specially set up or claimed under the Constitution . . . of . . . the United States" within the meaning of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents eight questions for review by this Court. All eight questions relate to the internal procedures followed by the Court below in reviewing decisions of a trial court. Each of the eight questions was raised for the first time upon petition for rehearing to the North Dakota Supreme Court. Respondent urges that the asserted eight questions are not properly presented for review to this Court, as they have no support in the record, were not timely raised below, and are frivolous on their face, contrived in order to attempt to invoke the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The record discloses that no constitutional provisions were involved or relied upon by either petitioner or respondent, from the original pleadings through the oral arguments presented to the North Dakota Supreme Court.

STATEMENT OF THE CASE

The questions presented for review to this Court by petitioner do not spring from the facts of this case. Petitioner has chosen wholly to ignore the nature of this case and how the factual issues and questions of law were dealt with by the Court below. Thus a statement of the case below will shed no light on petitioner's questions presented for review, but it will serve to persuasively demonstrate the absolute and total absence of a federal question in this case. The following statement of facts portrays a classic case that involves solely questions of state law and does not even raise an inference of constitutional import.

STATEMENT OF FACTS

On May 14, 1959, Stockmen's Insurance Agency, Inc. [hereinafter referred to as "Agency, Inc."] was incorporated for the stated purpose of carrying on through subsidiary corporations a health, accident and life insurance business in the State of North Dakota. The original plan of Agency, Inc. was to form a stock company authorized to write all kinds of life, health and accident insurance. This company was to be financed by proceeds from the sale of stock by Agency, Inc. The immediate objective was to raise $275,000.00 for this purpose. Stock sales were, however, much slower than anticipated, netting only $72,563.88 in cash and time sales through April 13, 1960. It then appearing that it would take an indefinite period of time to raise the necessary capital to secure a license for such a stock company, an alternative plan was devised to form a mutual company requiring only a $50,000.00 capital outlay.

The alternative plan was approved by stockholders of Agency, Inc., and a subsidiary corporation with interlocking officers and board of directors was formed. This subsidiary, named Stockmen's Health Mutual Co. [hereinafter referred to as "the Mutual Co."] was assured, on May 10, 1960, of a capital advance of $50,000.00 from Agency, Inc. in order that the Mutual Co. might commence business. Agency, Inc. then made public offerings of common stock and issued various prospectuses. Agency, Inc. was to derive its income from a management fee equal to ten per cent of gross premiums, as set forth in a *proposed* written management agreement to be entered into between Agency, Inc. and the Mutual Co., to run for a period of twenty years commencing June 9, 1960. This proposed written management agreement was, however, never executed by either of the parties. On June 7, 1960, the Mutual Co. commenced selling insurance policies through various general and writing agents.

These writing and general agents were employed by the Mutual Co. and its successor, Reserve Life, under alleged oral contracts whereby general agents were to receive a fifteen per cent renewal commission on all business sold through the general agency, a five per cent overwrite commission to go to the general agent and a ten per cent commission to the writing agent. Whether such express oral agency contracts ever existed and, if so, who were the parties to such contracts and what were the terms thereof, were all matters of dispute in this action. It was not in dispute, however, that written agency contracts were offered to various agents, but on all occasions were refused and were never executed.

On November 15, 1961, Agency, Inc. took action to absorb Dakota Protective Life, and on December 12, 1961, required all directors to execute notes equaling $55,000.00.

This takeover of Dakota Life, together with the notes, increased the assets of Agency, Inc. enough so that the original plan of a stock company could be effected. On December 13, 1961, a charter was obtained forming Stockmen's Reserve Life Insurance Company [hereinafter referred to as "Reserve Life"]. A merger was subsequently consummated leaving Reserve Life as the surviving company.

By July, 1963, Reserve Life was in serious financial difficulties. The North Dakota Insurance Commissioner was about to use $200,000.00, the required policy reserve on deposit by Reserve Life, to pay policy claims which were then in arrears to the extent of $180,000.00 to $200,000.00. Unless additional capital were immediately made available, the Commissioner indicated he would have issued an order stopping sales, and would have then followed the statutory proceedings for an insolvent insurance company.

It was at this point in time that the defendant-respondent, Guarantee Reserve Life Insurance Company of Hammond, Indiana [hereinafter referred to as "Guarantee Reserve"] first entered the picture. Guarantee Reserve proposed to reinsure and assume the policy obligations of Reserve Life. The proposed Contract of Reinsurance and Assumption was first presented at a special meeting of the board of directors of Agency, Inc. on July 27, 1963. It was subsequently approved and ratified by the stockholders of Agency, Inc. on August 26, 1963, and by the stockholders of Reserve Life on the same day. The Contract of Reinsurance and Assumption was executed by the respective parties, apparently on July 27, 1963, but did not become effective until approved by the Insurance Commissioners of both North Dakota and Indiana, on August 28, 1963. The contract was executed by Larry Davis as presi-

dent of Reserve Life and Jerome Kutak as president of Guarantee Reserve.

Under the terms of the assumption agreement, Guarantee Reserve assumed no liability, debt or obligation of Reserve Life other than policy liabilities and agents' commissions as provided for in existing written contracts. At meetings in the North Dakota Insurance Commissioner's office contemporaneous with the negotiations preceding execution of the assumption agreement, the Commissioner inquired of Guarantee Reserve regarding its position on payment of agents' renewal commissions on business written for the Mutual Co. and Reserve Life. Guarantee Reserve responded to the request by letter dated August 19, 1963, received in the Commissioner's office August 27, 1963. In view of its importance, that letter is set forth in its entirety below:

"August 19, 1963

Honorable Frank Albers
Commissioner of Insurance
State Capitol Building
Bismarck, North Dakota

Dear Sir:

In keeping with your request regarding the payment of commissions to agents of Stockmen's Reserve Life Insurance Company within a contract dated July 28, 1963, I have discussed the commissions with Mr. Davis, President of Stockmen's Reserve Life Insurance Company, and found that there are no written agreements between Stockmen's Health Mutual and Stockmen's Reserve Life and its agents and/or general agents.

It is our understanding that the writing agents have been paid 10 per cent and the general agents 5 per cent. This commission was to be paid so long as

these agents devoted 100 per cent of their time to the development of these two companies.

Guarantee Reserve Life Insurance Company of Hammond will agree to continue the payment of commissions to presently active writing agents and to their general agents—writing agents have a commission of 10 per cent and general agents an overwrite of 5 per cent, with no recapture of commissions permitted to the general agent; so long as these agents and/or general agents are licensed by and contracted to Guarantee Reserve Life and devote all of their time and energy to the business of Guarantee Reserve Life in the service of the business that they have written and in the production of a satisfactory amount of new business.

Sincerely yours,

Guarantee Reserve Life Ins. Co.
/s/ Ira Lipshutz
Ira Lipshutz

IL:lhg"

After Guarantee Reserve reinsured the policies of Reserve Life, 25 of 284 general and writing agents, who at one time were employed by the Mutual Co. and its successor Reserve Life signed written agency contracts with Guarantee Reserve. The remaining agents, for reasons not known, chose not to accept employment with Guarantee Reserve. With the exception of one, all those 25 agents have since been properly terminated by Guarantee Reserve, pursuant to the terms of their written agency contracts. Those 25 agents, while employed by Guarantee Reserve, were paid their renewal commissions on Reserve Life business pursuant to the commitment of Guarantee Reserve contained in the letter of August 19, 1963.

On May 9, 1965, Agency, Inc. commenced an action in Burleigh County District Court seeking recovery of a management fee allegedly owed by Reserve Life to Agency, Inc. and allegedly assumed by Guarantee Reserve under the Contract of Reinsurance and Assumption. The following year, while this action lay dormant, Agency, Inc. sold all of its assets of whatsoever kind to United Reserve Underwriter's, Inc., a Colorado corporation. Four years later, on August 6, 1970, Agency, Inc. amended its complaint in the original action commenced in 1965, alleging for the first time a right to recover renewal commissions allegedly owed by the defendant, Guarantee Reserve, to the 259 agents who chose not to accept employment with Guarantee Reserve and to those 25 agents who accepted employment with Guarantee Reserve, for the period following their termination.

The action was tried to the Burleigh County District Court, without a jury, in February, 1971. In an oral decision rendered from the bench the trial judge ruled in favor of Guarantee Reserve on Agency, Inc.'s claim for a management fee and in favor of Agency, Inc. on its claim to recover renewal commissions.

Guarantee Reserve appealed from that part of the judgment awarding Agency, Inc. renewal commissions. Agency, Inc. cross-appealed from that part of the judgment denying Agency, Inc. its claimed management fee. Both appeals followed extensive post-trial motions and one appearance before the North Dakota Supreme Court on various procedural motions. However, none of these procedural issues arising prior to the North Dakota Supreme Court's decision on the merits is raised in petitioner's questions presented for review.

After receipt of the record and briefs on the appeal of Guarantee Reserve and cross-appeal of Agency, Inc.

the case was placed on the calendar for the June, 1972, term of the North Dakota Supreme Court. Oral arguments were set for June 9, 1972. Agency, Inc., petitioner herein, was allowed one hour in which to present its case; Guarantee Reserve, respondent herein, was allowed one and one-half hours. Oral arguments were presented to the entire Court, consisting of five judges. Four of the five judges were regular judges of the North Dakota Supreme Court, while the fifth judge was a district judge called upon pursuant to the provisions of Section 100 of the North Dakota Constitution. The district judge sat on the case in place of the Chief Justice who, as a policyholder of Guarantee Reserve, disqualified himself. At the time oral arguments were presented to the North Dakota Supreme Court no objection was made by petitioner regarding the qualifications of the district judge or the manner in which he was called upon to sit as a judge of the Supreme Court.

On February 13, 1974, the North Dakota Supreme Court rendered its decision affirming in part and reversing in part the judgment of the district court. The decision affirmed the district court's denial of the management fee claimed by Agency, Inc. and reversed the district court's award of renewal commissions to Agency, Inc. After receiving an extension of time in which to petition for rehearing, Agency, Inc., on March 7, 1974, filed a Petition for Rehearing in the North Dakota Supreme Court, reciting six issues for consideration. Only one of the issues (the sixth) asserted a constitutional violation. The issue as stated was that "[t]he appellate procedure was unconstitutional". In support of this asserted constitutional violation, Agency, Inc. submitted to the North Dakota Supreme Court the identical argument, verbatim, that is set forth under the heading "Constitutional Questions" in the Petition for Writ of Certiorari.

On April 25, 1974, the North Dakota Supreme Court entered an amended opinion and denied the Petition for Rehearing without comment. The amendments to the original opinion are not material to the questions presented for review in the Petition for Writ of Certiorari. After amending its original opinion, however, the Court allowed Agency, Inc. the opportunity to file a petition for rehearing as to the amended opinion. Agency, Inc. filed a second petition for rehearing on May 8, 1974, which was denied by the Court without comment on May 16, 1974. The second petition raised no constitutional questions except in passing in the conclusion. Without specifying what provisions of the state constitution were violated the petitioner asserted the North Dakota Supreme Court failed ". . . to issue a written opinion on every question raised", kept ". . . secret the rules under which it. . ." operated and called upon a district judge to sit on the Court in violation of the state constitution. Petitioner sought a rehearing before what petitioner characterized as a "properly constituted panel" of the Court.

None of the numerous specifications of error and specifications of insufficiency of the evidence alleged in the appeal of Guarantee Reserve and cross-appeal of Agency, Inc., ever purported to raise a federal question. Petitioner, as it must, concedes that no federal question was urged on argument of the appeals before the North Dakota Supreme Court. Petitioner's purported federal questions were first raised in the first petition for rehearing after a decision had been rendered by the Supreme Court adverse to petitioner. Thus petitioner's first attempt to create a federal question was a rather confused and contrived assault upon the makeup of the North Dakota Supreme Court panel urged some twenty-one months after petitioner had presented extensive oral argument on appeals to that Court.

ARGUMENT

Petitioner asserts eight questions presented for review. Under the heading "Time and Manner of Raising Constitutional Questions" at page 5 of the Petition, it is conceded that none of the purported federal questions were raised until the first petition for rehearing directed to the North Dakota Supreme Court. Petitioner's purported federal questions are set forth below verbatim, with argument following, in the order they appear in the petition.

1. **"Can an appellate judge, admittedly too prejudiced to sit himself, select his substitute who he knows under the court's unwritten code will be assigned the case and will be the only judge to review the record and determine the facts for all the other judges?"**

The first question is replete with assumed facts that are patently false and not supported by a shred of evidence in the record. The Chief Justice deeming himself disqualified as a policyholder of the respondent withdrew from the case. In such instances the North Dakota Constitution provides:

> "Section 100. In case a judge of the supreme court shall be in any way interested in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the hearing of said cause."

Pursuant to this constitutional provision, District Judge Douglas B. Heen was called upon and sat in place of the Chief Justice. Petitioner assumes in his question that the Chief Justice chose his replacement. The record pro-

vides no support for such an assumption. Yet even if it had been so, such an act was ministerial in nature and obviously received the ratification of the remaining judges when the court convened with Judge Heen at the bench.

Petitioner's assertion that there exists an "unwritten code" among the members of the Court that a substitute district judge will be assigned the case is at best a bizarre figment of counsel's rather vivid imagination. One has only to examine the volumes of the reported decisions to find numerous examples where the Court's opinion was written not by the designated district judge sitting on the panel but rather by one of the regular Supreme Court judges. For example: *Richland County* v. *State,* 180 N.W.2d 649 (N.D. 1970) (opinion by Judge Strutz, District Judge Giese sitting in place of Judge Paulson); *Loeb* v. *Landon* and *Mahrer* v. *Landon,* 214 N.W.2d 503 (N.D. 1973) (opinion by Judge Teigen, District Judge Beede sitting in place of Judge Vogel); *Heid* v. *Shafer,* 140 N.W. 2d 584 (N.D. 1966) (opinion by Judge Strutz, District Judge Kelsch sitting in place of Judge Burke); *McNaught* v. *MacArthur,* 209 N.W.2d 639 (N.D. 1973) (opinion by Judge Teigen, District Judge Giese sitting in place of Judge Erickstad); *Perdue* v. *Knudson,* 179 N.W.2d 416 (N.D. 1970) (opinion by Judge Strutz, District Judge Jansonius sitting in place of Judge Knudson).

Even if such an informal rule were in effect, what constitutional right of petitioner would be violated? The opinion stating the decision and the reasoning of the Court is not simply the opinion of the single judge whose name appears at the head of the opinion. It is the opinion *of the Court,* adopted by the Court in the case of a unanimous decision, as in the instant case, or by a majority of the judges, unless special concurring opinions are written, in the case of a split decision. The opinion in the

instant case was signed by all five judges sitting on the panel for the case and thereby became the unanimous opinion of those judges and of the Court.[1]

Petitioner's final assumption that a substitute district judge ". . . will be the only judge to review the record and determine the facts for all the other judges" is wholly unsupported by the record. Furthermore, the assertion, frivolous on its face, is a gross insult to the North Dakota Supreme Court unbecoming for a member of the bar. The opinion was written by the district judge, sitting here as a judge of the Supreme Court by designation, but the unanimous decision was the decision of the entire Court after presentation of extensive briefs and oral arguments to the entire Court. Obviously the record does not and cannot reflect the procedures followed by the five judges in their decision-making process. To open up the private chambers of appellate judges to scrutiny by counsel or the public would effectively destroy the independence and objectivity of the appellate judicial process. The confidentiality of the decision-making process of our courts must remain sacrosanct if appellate review is to remain a viable part of the judicial system.

Once a decision is reached it necessarily becomes a matter of public record. The decision when rendered must conform to the following sections of the North Dakota Constitution:

> "Section 101. When a judgment or decree is reversed or confirmed by the supreme court every point fairly arising upon the record of the case shall be concisely

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1. Notwithstanding the startling and peculiar allusion in the Petition (Appendix, A17) that four of the judges' signatures are "illegible" these signatures are in fact perfectly legible and clear and are those of Judges Erickstad, Teigen, Paulson and Knudson.

> stated in writing, signed by the judges concurring, filed in the office of the clerk of the supreme court and preserved with a record of the case. Any judge dissenting therefrom may give the reason for his dissent in writing over his signature."
>
> "Section 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case."

The provisions of Section 101 requiring consideration and decision of ". . . every point fairly arising upon the record of the case . . ." has been held to mean every point the decision of which is necessary to the final determination of the cause. *Heald* v. *Strong*, 138 N.W. 1114 (N.D. 1912). A review of the opinion in the instant case, officially reported at 217 N.W.2d 455 (N.D. 1974), confirms compliance with each and every mandate of these North Dakota Constitutional provisions.

The opinion of the North Dakota Supreme Court setting forth the detailed reasoning underlying its decision should be scrutinized by counsel and other interested persons, for it is only by critique of a court's reasoning that judgments can be made regarding the competency of judicial officers and the merits of petitions for rehearing. It is curious, therefore, that petitioner in its questions presented for review does not even so much as allude to the reasoning and holdings of the Supreme Court in reaching its decision.

2. **"Can the substitution of a trial judge to sit as an appellate judge be concealed until the moment of oral argument when it is too late to remove the substitute for prejudice?"**

Petitioner's asserted federal question is specious on its face. The record is absolutely devoid of evidence providing any basis for a claim of prejudice of the substitute district judge. Petitioner does not question that District Judge Heen was a fully qualified district judge within the meaning of Section 100 of the North Dakota Constitution. Surely petitioner understands that it has no right, constitutional or otherwise, to have a case heard on appeal before a particular group of appellate judges. When petitioner's counsel appeared before the North Dakota Supreme Court's panel on June 9, 1972, and presented extensive oral argument, District Judge Heen was a part of that panel of five judges. During that oral argument petitioner's counsel made not the slightest suggestion that the panel was not properly constituted, that any of its members were not duly qualified or that any of its members should be disqualified for prejudice or otherwise. Only after an adverse decision was rendered approximately twenty months later was petitioner, on petition for rehearing, heard to question the qualification and selection of District Judge Heen.

3. **"Can the substitute stall his decision so long that only a reversal of the trial judge's decision will nullify the outrageous delay and conceal the $50,000.00 tax free windfall which the delay alone gave the racketeer controlled defendant?"**

This purported federal question attacking the integrity of the substitute district judge and vilifying the respondent corporation without a shred of supporting evidence

in the record is scandalous and alone provides good cause for this Court to strike petitioner's argument under the provisions of Rule 40(5) of its Rules. Petitioner claims delay in the North Dakota Supreme Court's rendering of its decision. The decision was assigned to the substitute district court judge who aside from his selection to sit on the Supreme Court for this case, had the demanding and continuing duties of a trial judge of a court of general civil and criminal jurisdiction. This case involved numerous issues complex both factually and legally. Respondent's appellate brief alone presented 181 pages of argument on sixteen separate issues. Yet petitioner capriciously indicts the Court below for taking the time necessary to study a lengthy record, examine voluminous exhibits, study extensive briefs and render a decision in a very complex case. The absurdity of petitioner's contention speaks for itself.

4. "Can the failure to select a substitute judge in the manner required by the state constitution be concealed by failing to write an opinion on the point as required by the state constitution?"

Section 100 of the North Dakota Constitution requires that in the event of disqualification of a member of the Supreme Court the ". . . remaining judges of said court shall call one of the district judges to sit with them on the hearing of the case". There is nothing in the record of this case or in the reported decision in this case that provides the slightest support for petitioner's assumption that the Chief Justice, who disqualified himself, selected the substitute district judge. The district judge sat in place of the Chief Justice with the four remaining judges of the Court present in open court when petitioner presented extensive oral arguments. How can petitioner now

seriously urge as a federal question to this Court that the substitute district judge was not called upon by the remaining judges? Petitioner cites nothing in the record or in any other source to support its unfounded conclusory allegation. It is presumed under the law of North Dakota that an official duty has been performed regularly and that a court or judge, acting as such, was acting in the lawful exercise of his lawful jurisdiction. N.D.C.C. §§ 31-11-03 (15), (16); *Snortland* v. *Nelson County,* 123 N.W.2d 288, 291 (N.D. 1963). This presumption is, of course, universal in American law. *E.g., Sewell* v. *Lainson,* 57 N.W.2d 556, 559 (Iowa 1953); *State ex rel. School District No. 56* v. *Schmiesing,* 66 N.W.2d 20, 26 (Minn. 1954); *Martin* v. *Smith,* 1 N.W.2d 163, 169 (Wis. 1941). This Court has pointed out many times that in the absence of clear evidence to the contrary, courts will presume that official duties have been properly and lawfully discharged. *E.g., Perkins* v. *Matthews,* 400 U.S. 379, 394 (1971); *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1, 14-15 (1926).

Further, in construing Section 101 of the North Dakota Constitution, the provision requiring the Court to write an opinion on every question fairly arising on the record, the North Dakota Supreme Court has held that this encompasses only questions necessary to a determination of the issues before it. *Inches* v. *Butcher,* 104 N.W.2d 556 (N.D. 1960). Clearly, the appointment of a substitute district judge was neither a necessary nor a relevant issue in this case and did not arise upon the record.

5. "Can the trial judge selected as appellate substitute examine the cold record and make diametrically opposed findings of fact after the legislature had specifically revoked the appellate court's right to grant a trial de novo?"

Petitioner misconceives the scope of judicial review of findings of trial courts. This case was presented to the trial court without a jury. At the time of review of this case on appeal the North Dakota Supreme Court was bound by amended Rule 52(a) of the North Dakota Rules of Civil Procedure, which became effective August 1, 1971. North Dakota adopted Rule 52(a) at that time verbatim from the Federal Rules of Civil Procedure. Under the provisions of Rule 52(a) a trial court's finding of fact may be set aside when "clearly erroneous". This Court had occasion early in the history of the Federal Rules of Civil Procedure, to comment on the scope of judicial review within the meaning of Rule 52(a):

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. . . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction

> that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

That it was precisely this standard of review that was applied by the North Dakota Supreme Court in rendering its decision is made abundantly clear by examination of that part of the opinion appearing at pp. A15-A16 of the Petition for Writ of Certiorari. (217 N.W.2d at 462-63).

6. "Where all judges are elected, can a judge from a foreign district be imposed on the local district without violating the elective franchise?"

Petitioner asserts the violation of its elective franchise by the substitution of a district court judge to sit in the place of a disqualified Supreme Court Judge. The argument is specious on its face.

> "'Elective franchise' is the right or privilege of a qualified elector or voter to cast his ballot freely in favor of the man of his choice, in an election authorized by law to be held." *Xippas* v. *Commonwealth*, 126 S.E. 207, 209 (Va. 1925).

The petitioner is a business corporation. It has, therefore, no elective franchise, either under constitution or statute, which can be violated or infringed.

Petitioner charges that a judge from a "foreign district" was imposed on the "local district". This was not a case where a district judge tried the case outside his own district. Any judgment can be appealed to the Supreme Court in North Dakota. Section 100 of the Constitution of North Dakota has provided since 1889 that a district judge shall be called to sit as a Supreme Court Judge in place of one of the judges who is himself interested in the cause. In such an instance, of which this case

was one, any district judge is qualified; he is not a "foreign judge" and he is not being "imposed on the local district." No district judge, or judicial district is "foreign" to the Supreme Court.[2] No federal constitutional question is remotely involved.

7. "Are the constitutional standards met when the methods of review are concealed, no rules of review exist except a sort of gentlemen's agreement amongst the judges that if a trial judge takes his time to do their appellate duties, the least they can do is go along with him?"

Respondent confirms that there exist no formal written "rules of review" governing the decision-making process of the North Dakota Supreme Court. The observation might also be made that no appellate court known has promulgated or is governed by so-called "rules of review". As in any other appellate court, the North Dakota Supreme Court and the litigants before it are bound by applicable procedural rules, statutes and constitutional provisions. Quite obviously that includes the North Dakota Rules of Civil Procedure and the Rules of Appellate Procedure for the Supreme Court of North Dakota. However, once a case is fully submitted to the Supreme Court it is absurd to suggest that the court's deliberations should be made subject to "rules of review" and open to public scrutiny. The critical necessity of uncompromised confidentiality and free exchange of thoughts and arguments among deliberating judges, not subject to outside influence, criticism or partisan pressure, and not impeded

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2. It is possible, in fact, that all the regular judges of the Supreme Court may be disqualified in a particular case, so that the ultimate panel will consist of five district judges, sitting as judges of the Supreme Court for that case. *In re Murray*, 145 N.W.2d 899 (N.D. 1966).

by formalistic rules, is at the very heart of the Anglo-American judicial system.

Petitioner's reasoning carried to its logical end would open the deliberations of a petit jury to the public scrutiny and regulate those deliberations by application of "rules of review" or rules of decision. The concept is abhorrent to our jurisprudential system and as "destructive of judicial responsibility" as this Court found the examination of the decision-making process of the Secretary of Agriculture in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (opinion by Frankfurter, J.). The confidentiality of such deliberations has been a fundamental principle for centuries. In *Coward* v. *Porter*, 94 Eng. Rep. 1106 (K.B. 1734), the English court pointed out that "very mischievous consequences" would attend the allowance of testimony by jurors as to their intentions in deliberation and decision-making.

Finally, the clear inference or assumption in petitioner's statement of a purported federal question that four judges of the North Dakota Supreme Court abdicated their judicial duties, did not examine the entire record, and concurred in the substitute district judge's opinion solely in deference to his willingness to write the opinion, represents a serious and unfounded attack upon the integrity of those judges. Such an attack when not founded upon one scintilla of evidence in the record constitutes a scandalous charge casting serious doubts upon the motives of petitioner's counsel.

8. **"The constitutional right to a trial was met and a half million dollar judgment granted, which is a property right. Can the right to a trial and the property right be taken away by the appellate method used here which has so far departed from the accepted and usual course of judicial proceedings as to constitute a denial of due process, equal application of the law, and the elective franchise?"**

In North Dakota appeal from any district court judgment to the Supreme Court is a matter of right. Thus, a judgment of a district court in the State of North Dakota does actually not become final until the time for appeal to the State Supreme Court has expired or the Supreme Court has acted on review and the time for petitioning for rehearing from the Court's decision has expired. It is axiomatic, then, that a district court judgment cannot create a vested property right but rather creates a contingent right subject to review by the North Dakota Supreme Court and under limited circumstances review by this Court.

Petitioner's remaining assertions attacking the "appellate method" are too vague to permit intelligent response. Presumptively petitioner refers to those matters raised in the previous seven questions presented for review. Petitioner is unable to point to the record and identify in a single respect how this case was reviewed on appeal in a manner other than in the "accepted and usual course of judicial proceedings".

PETITIONER'S AUTHORITIES

Petitioner cites but two cases in its petition, *State* v. *Meisinger*, 103 N.W.2d 864 (Minn. 1960) on page 11 and *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937)

on page 16. Neither of these cases has any relevancy to this case, either as to law or facts.

On page 16 of the petition, petitioner gratuitously quotes a sentence from 16 Am.Jur.2d §382 (1964), "a cause shall not be heard before a prejudiced court." We fully agree with that abstraction—but it did not happen here. This is but another baseless innuendo by the petitioner, with which the petition is replete.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below by the Supreme Court of North Dakota did not involve any question of federal law.

Respectfully submitted,

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